11-11-1975

Holman Enterprise Tobacco Warehouse and Employer's Mutual Liability Insurance Company v. Dennis W. Carter, James R. Yocom, Commissioner of Labor and Custodian of the Special Fund, and Workmen's Compensation Board.

Appellee's Brief 1975-SC-0875

KYSC1975-SC-0875-01
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APPELLEE'S BRIEF

536 SW 2d 461

COURT OF APPEALS OF KENTUCKY

NO. 75-875

HOLMAN ENTERPRISE TOBACCO WAREHOUSE
and EMPLOYER'S MUTUAL LIABILITY
INSURANCE COMPANY . . . . . APPELLANTS

VS.

DENNIS W. CARTER, JAMES R. YOCUM,
Commissioner of Labor and Custodian
of the SPECIAL FUND, and WORKMEN'S
COMPENSATION BOARD. . . . . APPELLEES

APPEAL FROM THE WARREN CIRCUIT COURT
HON. THOMAS W. HINES, JUDGE

BRIEF FOR APPELLEE, DENNIS W. CARTER

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This is to certify that pursuant to RCA 1.250, a copy of this brief has been served on the trial judge, Hon. Thomas W. Hines, Judge, Warren Circuit Court, Courthouse, Bowling Green, Kentucky 42101; on counsel for Appellants, Hon. Norman E. Harned, 1033 State Street, Bowling Green, Kentucky; on counsel for Appellee, Special Fund, Hon. Cyril Shadowen, Assistant Counsel, Department of Labor, 310 Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40201; and on the Appellee, Workmen's Compensation Board, Department of Labor, Frankfort, Kentucky 40601. This 10th day of November, 1975.

Harold Ricketts

Attorney for Appellee,
Dennis W. Carter

3401

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The Lower Court says: YES.

The Appellee, Dennis W. Carter, says: YES.

II. WHETHER THE WORKMEN'S COMPENSATION BOARD ERRED IN FAILING TO ASSIGN PRIOR ACTIVE OCCUPATIONAL DISABILITY TO A WORKMAN WHO, FROM UNDISPUTED EVIDENCE, HAD PREVIOUS BACK INJURIES, HAD RECEIVED MEDICAL TREATMENT FOR ARTHRITIS AND HIGH BLOOD PRESSURE AND HAD BEEN PAID WORKMEN'S COMPENSATION BENEFITS FOR PERMANENT DISABILITY, WHEN THE WORKMAN SUFFERED A SUBSEQUENT BACK INJURY?

The Lower Court says: NO.

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BRIEF FOR APPELLEE, DENNIS W. CARTER

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The appellee-employee, Dennis W. Carter, (hereinafter called employee) is married and has one (1) minor child living in his home. (Tr. Evid., p. 4, Q & A 9 and 13) He has a 6th grade education and is 55 years of age. (Tr. Evid., pp. 3-4, Q & A 14 and 5-8) He has no specialized or vocationsl training. (Tr. Evid., p. 5, Q & A 15)

On November 11, 1972, he was employed by the appellant-employer, Holman Enterprise Tobacco Warehouse, (hereinafter called employer) in Warren County Kentucky, (Tr. Evid., pp. 5-6, Q & A 24-26) as a handy man laborer (Tr. Evid., p. 6, Q & A 27) at a weekly wage of $95.00. (Tr. Evid., p. 7, Q & A 34) The employer and employee have stipulated that on this date they had agreed to and were operating under the provisions of the Workmen's Compensation Act of Kentucky. (Tr. Evid., p. 3) Along with this employment, the employee was engaged in agricultural work as a tenant farmer

and laborer. (Tr. Evid., pp. 21-23, Q & A 15-33)

On the morning of the above date, which was a Saturday, the employee was helping unload a load of tobacco, had a hook pulling a basket of tobacco off when something popped in his leg or back and his right leg became numb. This was immediately reported either to Jimmy Belcher, the employer's floor manager, or to Billy McGoodwin, the boss. (Tr. Evid., pp. 7-9, Q & A 38-52)

The employee finished the day out and, even though his leg was very painful, returned to work on Monday. (Tr. Evid., p. 9, Q & A 54 and p. 10, Q & A 57-59)

On Tuesday morning, the employee went to Dr. Jim Burt, who gave him a prescription. He went back to work and was helping unload another load of tobacco when the pain became so bad he had to call his son to come and get him. When he reached home, he had to crawl up the steps on his elbows because he couldn't walk. (Tr. Evid., pp. 11-12, Q & A 67-73)

The next morning, he still coulen't walk and went to Dr. Z. K. Beesley in Franklin, Kentucky, who put him in the Franklin hospital for five (5) days, after which he went home and was treated as an outpatient by Dr. Beesley until January, 1973, when Dr. Beesley referred him to Dr. Frank L. Buono, an orthopedic specialist, in Bowling Green, Kentucky. (Tr. Evid., pp. 12-13, Q & A 74-85)

Dr. Buono treated the employee conservatively until July 22, 1973, when the employee was admitted to the Greenview Hospital for surgery on the lower part of his back for a disc removal. (Tr. Evid., pp. 13-16, Q & A 88-107 and Dep. Dr. Buono, pp. 7-8, Q & A 33-42) He was still under the care of Dr. Buono at the time of Dr. Buono's deposition. (Tr. Evid., p. 16, Q & A 108; p. 39, Q & A 151-152 and Dep. Dr. Buono, p. 12, Q & A 67)

After the filing of the claim, the appellee, Special Fund, was made a party to same, and the report of Dr. K. Armand Fischer, who was appointed by the Board to examine the appellee pursuant to KRS 342.121, was duly filed in the record.

On February 14, 1975, the Board entered an opinion and award in which it found that the employee did not have any occupational disability prior to his accident and injury herein, either from a pre-existing condition or prior injury; that the accident and injury herein was the sole cause of the employee's total disability; and awarded the employee $60.00 per week for an indefinite period not to exceed 425 weeks. The Special Fund was dismissed as a party.

This opinion and award was appealed to the Warren Circuit Court, which, on July 8, 1975, entered its order and final judgment finding that the opinion and award was in conformity with the provisions of the law and is supported by substantial and probative evidence in the record and affirmed same.

From this final judgment the appellants have prosecuted this appeal and made a supprecedeas bond.

ARGUMENT

Before arguing the individual questions to be decided by the Court of Appeals, the employee states as to both questions that if the Findings of Fact in the Opinion and award of the Board are supported by substantial and probative evidence and are consistent with the statutory and case law, the Courts are without power or authority to reconsider the case and substitute their opinion for that of the Board. HALL V. INLAND CREEK COAL CO., Ky., 474 S.W.2d 890 (1971) The only testimony introduced by the appellants was the testimony of W. S. (Billy) McGoodwin, the operating manager of the employer; therefore, the uncontradicted evidence of the

employee regarding his accident and injury was admitted by the employer and is as follows:

1. That on November 11, 1972, the employer and employee had elected to and were operating under the provisions of the Workmen's Compensation Act of Kentucky. (Tr. Evid., p,-3, Stipulation)

2. That on said date, the employee suffered an accident and injury to his back and right leg that arose in and out of the course of his employment with the employer. (Tr. Evid., p. 7, Q & A 39)

3. That due and timely notice of said accident and injury was given to the employer. (Tr. Evid., p. 9, Q & A 48-53)

The employer admitted that the employee had been working for the employer some 15-20 years (Dep. McGoodwin of October 22, 1974, p. 3 Q & A 13-13); that during these years the only work available was heavy manual labor; and that the employee performed this heavy manual labor regularly. (Dep. McGoodwin of October 22, 1974, p. 11, Q & A 1-4) (Emphasis writer's)

The only questions that remained for a decision by the Board were the determination of the employee's average weekly wage and the nature and extent of the employee's disability to his body as a whole.

I. WHETHER A SEASONAL WORKMAN'S SELF-EMPLOYED AND SHARECROP INCOME MAY BE INCLUDED IN HIS TOTAL WAGES PURSUANT TO KRS 342.130(2) FOR THE PURPOSE OF INCREASING HIS AVERAGE WEEKLY WAGE AND WORKMEN'S COMPENSATION DISABILITY BENEFITS THEREON?

KRS 342.004 provides that the Workmen's Compensation Act shall be liberally construed, and the Court of Appeals has interpreted this section, when the injuries and disabilities have been factually found, to mean that any doubt as to the application of the compensation law must be resolved in favor of the employee or his dependants and that all presumptions will be indulged to ac-

complish that end. HINKLE V. ALLEN-CODELL CO., 298 Ky. 102, 182 S.W.2d 20; DICK V. INTERNATIONAL HARVESTER CO., Ky., 310 S.W.2d 514 (1958); OAKS V. BETH-ELKHORN CORP., Ky., 438 S.W.2d 482 (1969) and COWDEN MFG. CO. V. FULTZ, Ky., 472 S.W.2d 679 (1971)

The appellants claim that the employee was a seasonal employee und-r KRS 342.140(2), and that his other employment as a tenant farmer and farm laborer are solely agricultural employment which is exempt from coverage of the Workmen's Compensation Act of Kentucky; therfore, the earnings from this other occupation cannot be utilized in determining the employee's average weekly wage under KRS 342.140(2). The appellants admit that if such wages or earnings are to be considered in determining the employee's average weekly wage, he would be entitled to the maximum weekly benefit of $60.00 per week as awarded by the Board.

This section of the Act provides that the average weekly wage of a seasonal employee shall be one-fiftieth (1/50th) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the date of the injury. The wages of a self-employed farmer or tenant farmer and farm laborer are his gross receipts from wages, sale of crops, etc.; therefore, the wages of the employee herein from November, 1971, through October, 1972, were:

Holman Enterprise Tobacco Warehouse:

1971 - last quarter	$627.20	
1972 - first quarter	170.20	
1972 - last quarter	75.00	
Total		$ 981.40

NOTE: These figures are from the payroll records of the employer filed as Exhibit to the deposition of McGoodwin taken on October 22, 1974.

1972 Income Tax Return of Employee:

Farm Income	$3,046.00	
Paul N. Allen - wages	258.00	
Total		3,304.00
Grand Total		$4,285.00

NOTE: A copy of this above tax return is filed as Exhibit to the deposition of the employee taken on October 22, 1974)

In addition to the above, from September, 1971, to the date of the employee's accident and injury herein, he was furnished a five room house by Paul N. Allen as part of his wages for working for Allen, and Allen also paid one-half of the fuel bill (gas and coal). (Dep. of Employee of October 22, 1974, pp. 17-18, Q & A 14-23) KRS 342.140(6) provides that "wages" as used in this section also includes rent, housing, fuel, etc., furnished to the employee by an employer; therefore, at a nominal rental value the housing furnished to the employee herein would equal $600.00 or more. Also, in the testimony referred to above, the wages specifically set forth herein do not include the wages earned by the employee for working for Paul N. Allen in November and December, 1971; the receipts from the sale of the dark tobacco crop sold in late 1971; and the wages paid to the employee by McGoodwin for the labor in the repaid of the storm damage to the tobacco warehouse early in the fall of 1972. (Dep. McGoodwin of October 22, 1974, p. 8-10, and Stipulation filed by the employer and employee on or about January 27, 1975)

The appellants cite the case of DEPARTMENT OF PARKS V. KINSLOW, Ky., 481 S.W.2d 686 (1971) and cases from foreign jurisdictions in support of their claim that wages received in agricultural employment are not to be taken into consideration in arriving at the seasonal employee's average weekly wage under KRS 342.140(2); however, this case involved an employee who had neither wages nor other employment in the off season, and the Coourt of Appeals stated that, although the evidence was that he worked on his wife's farm, there was no evidence that he received any pay for this work.

On page 12 of their brief, the appellants state that under KRS 342.003(j) farm laborers are excluded from coverage by the Act. KRS 342.003(a-j) merely defines what "Hazardous occupations" shall

mean and include as used in KRS 342.016 and 342.017. These sections pertain solely to the giving of security or bond by an employer engaged in a hazardous occupation to insure the payment of benefits to an injured employee and a hearing to determine the amount and terms of such security or bond. Certain employers are excepted from having to give such security or bond.

Under KRS 342.005, prior to January 1, 1973, and the amendment of this section effective on that date, there were certain exemptions to coverage by the Workmen's Compensation Act, namely:

1. The employees of an employer having less than three employees.
2. Domestic employees.
3. Agricultural employees.
4. Employees of such common carriers other than steam railways for which a rule of eligibility is provided by the laws of the United States.
5. An employer who has less than three employees.
6. Steam Railway employees.

To accept the claim of the appellants that only wages earned in non-seasonal employments that are covered by the Act can be considered by the Board in arriving at the average weekly wage of the seasonal employee would mean that none of the earnings of the employees exempted above earned in the non-seasonal employment could be considered, ie., that any seasonal employee whose other employment was through selfemployment, domestic employment, agricultural employment, employment by an employer who has less than three employees, etc., would not have his wages for such non-seasonal employment included in arriving as his average weekly wage under KRS 342.140(2).

If this rule were to be adopted, then employers would be

relieved from liability for compensation benefits based on such earnings from such non-seasonal employments; however, all employers demand that the Board, in considering the disability of an injured employee, take into consideration the ability of such employee to work in any of these non-seasonal employments, ie., an employee whose non=seasonal employment is not exempt but covered by the Act, and who is injured by a compensable injury and disabled to the extent that the only employment that he can obtain is in an exempt employment would have to be automatically totally disabled unless the Board considered the ability to work in the exempt employment.

A decision by this Court that non-seasonal exempt employment earnings are not wages for the purpose of obtaining the average weekly wage of an injured seasonal employee, but that such employment is to be considered in determining the degree of disability of the employee is not a liberal contruction of the Act, but is a very limited construction of the Act. The case of ROBERTS V. FRANK CARRITHERS BROTHERS, 180 Ky., 315, 202 S.W. 659, cited by the appellants on the meaning of "wages", is not and cannot be in point because this case involved the definition of "income earned by labor" for the purpose of enforcing a judgment for the satisfaction of a debt and not workmen's compensation; thus, was and is not subject to the legislative direction that such exemptive clause or phrase shall be liberally construed on behalf of the farmer-debtor.

The appellants also stated before the Board and on pages 14-15 of their brief that the agricultural employment of the employee which is concurrent with his seasonal employment with the employer is an unrelated employment; therefore, not to be considered in arriving at his average weekly wage. This would be true is the Court accepts the rule that exempt non-seasonal occupational earnings are not to be so considered; however, the Court of Appeals, in FAYETTE COUNTY BOARD OF EDUCATION V. PHILLIPS, Ky., 439 S.W.2d 319, where the employee was a bus driver and also worked in a fac-

tory, stated that the concurrent occupations do not have to be related and that both employments are to be considered in arriving at the average weekly wage.

The Board, in paragraph 1 of its Findings of Fact contained in its Opinion and Award, found that the employee, although a seasonal worker for the employer, and engaged in non-seasonal agricultural employment or occupation exempt from coverage, had wages sufficient for the payment of maximum weekly compensation benefits of $60.00 per week pursuant to KRS 342.140(2).

II. WHETHER THE WORKMEN'S COMPENSATION BOARD ERRED IN FAILING TO ASSIGN PRIOR ACTIVE OCCUPATIONAL DISABILITY TO A WORKMAN WHO, FROM UNDISPUTED EVIDENCE, HAD PREVIOUS BACK INJURIES, HAD RECEIVED MEDICAL TREATMENT FOR ARTHRITIS AND HIGH BLOOD PRESSURE AND HAD BEEN PAID WORKMEN'S COMPENSATION BENEFITS FOR PERMANENT DISABILITY, WHEN THE WORKMAN SUFFERED A SUBSEQUENT INJURY?

The employee testified regarding his condition. He doesn't have much use of his right leg, that it feels like the nerves are dead; that he can't work the toes up and down (Tr. Evid., p. 17, Q & A 113-116 and p. 40, Q & A 155-156); that he has falled as a result of the condition of his right leg and has to walk with a stick (Tr. Evid., p. 44, Q & A 19-21); and that he was still under the care of Dr. Buono. (Tr. Evid., p. 15, Q & A 108 and p. 30, Q & A 151-152)

This evidence is substantiated by the testimony of Dr. Frank L. Buono, the treating specialist. On February 1, 1974, Dr. Buono found warkness in the right leg which be attributed to the back injury. (Dep. Dr. Buono, pp 9-10, Q & A 49-60) Dr. Buono does not specifically return his patients to work, but advises them, as he did the employee herein, to try to return and see what they acn do. The first time he recommended this to the employee was on February 26, 1973, and then again on April 9, 1973, both times being prior to the employee's surgery on July 25,

1973 (Dep. Dr. Buono, pp. 25-26, Q & A 120-121 and p. 13, Q & A 71); however, when he examined the employee on November 2, 1973, following surgery, he specifically kept him off work for three months becuase of the fining of weakness in the right foot, and, at the end of this three months, on February 1, 1974, he found specific weakness in the whole right leg. (Dep. Dr. Buono, p. 9, Q & A 49-51) At this time and with weakness, Dr. Bunon recommended that the employee try to work, but limited him to light duty, not to lift over 20 lbs. (Dep. Dr. Buono, pp. 13-14, Q & A 71-75) Dr. Buono still has the employee under his care. (Dep. Dr. Buono, p. 10, Q & A 58)

On cross-examination of Dr. Buono, the appellants placed in the record evidence of the employee's previous back injuries in 1959 and 1963; however, the medical records reflected that the 1959 injury was at the L-1 and L-2 vertebral disc space (Dep. Dr. Buono, p. 20, Q & A 260, and that the 1963 injury was a back strain. (Dep. Dr. Buono, pp. 17-18, Q & A 95) The present injury and surgery was at the L-5 and S-1 vertebral disc space. (Dep. Dr. Buono, p. 8, Q & A 41-42) The employee had completely recovered from the prior injuries, as he had, for many years after the prior injuries and prior to the present injury, performed all kinds of heavy labor without any problem including this employer. (Tr. Evid., pp. 23-24, Q & A 35-43; pp. 44-45, Q & A 11-18; and pp. 47-49, Q & A 15-25 and Dep. McGoodwin of October 22, 1974, p. 3 Q & A 12-13 and p. 11, Q & A 1-4) Where an employee has had a compensable disability, received his compensation and returned to work, and then receives a subsequent independent injury which incapacitates him, the prior injury should not be deducted. CABE V. SKEEN, Ky., 422 S.W.2d 884(1967)

The evidence of the employee and the findings of Dr. Buono were fully substantiated by the report of Dr. K. Armand Fischer, who examined the employee and filed his report with the Board

pursuant ro KRS 342.121. In this report, Dr. Fischer found:

> "He has rather marked loss of back motion, limited straight leg raising and he has a peroneal paralysis on the right side, so he cannot dorsiflex his right foot. He also has hypertension, with his blood pressure being 160/106. X-rays show severe arthritis in his lower seven dorsal vertebral bodies and arthritic changes throughout the lumbar spine, as well as mild narrowing of the fourth lumbar disc, as well as severe narrowing of the fifth lumbar disc space. If this parient was able to work and do laboring work from 1963 thru 11/11/72 he apparently did not have any disabling factors with his back, but he had an underlying diseased condition of his spine; namely, arthritis with degenerated discs. Apparently the accident of 11/11/72 and the surgery to his back brought this condition into disabling reality. He also sustained direct disability due to the accident of 11/11/72 and the surgery to his back. He still wears a brace and has pain down his legs and he has a peroneal paralysis of his right foot. He limps when he walks. It is my opinion he should not attempt to do any type of hard work, heavy lifting or bending. He might be able to do some light work as a guard or watchman."

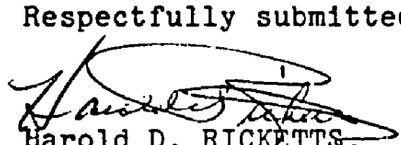
In its Findings of Fact contained in the Opinion and Award the Board, in paragraph 3, specifically held that the employee suffered no active occupational disability prior to his accident and injury on November 11, 1972, and further held on this question that his total disability was caused solely by reason of the accident, citing KLARER OF KY. V. PETERS, Ky. 473 S.W.2d 139 and ADAMS & MULBERRY CORP. V. BOLSTON, Ky. 487 S.W.2d 680. These cases pertain to situations where the injured employee had pre-existing conditions that were not disabling, such as this employee, ie., arthritis, disc degeneration, high blood pressure, etc., and hold that such conditions are not disease conditions under KRS 342.120; and if the injury causes such conditions to become disabling, the employer is liable for the entire disability under the"whole man" theory in which the employer takes the employee as he is. Since the employee's injury on November 11, 1972, KRS 342.120has been amended so that where the compensable injury causes such conditions to become disabling, the Special Fund is liable for the payment of the percentage of disability, if any, in excess of the disability caused solely by the compensable injury. YOCUM V. GIBBS. Ky., 525 S.W.2d 744(1975)

The percentages of disability testified to by the medical witnesses were functional or physical disabilities; however, when converted to occupational or economic disability, the employee was not able to work and was disabled for all but sedentary employment; therefore, totally disabled to his body as a whole. OSBORNE V. JOHNSON, Ky., 432 S.W.2d 800(1968)

CONCLUSION

The Findings of Fact, Opinion and Award of the Board are supported by substantial and probative evidence and are in compliance with both the statutory and case law; therefore, this Court should affirm the final order and judgment of the Warren Circuit Court, which sustained the opinion and award of the Board entered on July 8, 1975; and award to the appellees their costs in this appeal and penalty on the supersedeas bond and interest.

Respectfully submitted,



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